IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1765

MARK ALLEN GERALDS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE AND MOTION FOR GUIDANCE AS TO THE STANDARD FOR DETERMINING WHAT CONSTITUTES CAUSE

COMES NOW the Appellant, **MARK ALLEN GERALDS**, in the above-entitled matter and respectfully responds to this Court's October 27th Order to Show Cause and requests that the Court provide guidance as to what constitutes cause and permit further briefing on this issue after such guidance has been provided. For his reasons, Mr. Geralds states:

1. Mr. Geralds is under a sentence of death. His appeal of the denial of Rule 3.851 relief is before the Court. On October 27, 2017, before Mr. Geralds had submitted anything to this Court regarding his appeal, this Court issued an order that provided:

> Appellant shall show cause on or before Thursday, November 16, 2017, why the trial court's order should not be affirmed in light of this Court's decision in Hitchcock v. State, SC17-445. The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Friday, December 1, 2017, limited to no more than 15 pages. Appellant may file a reply to Appellee's reply on or before Monday, December 11, 2017, limited to no more than 10 pages.

A. MR. GERALDS' RIGHT TO APPEAL THE DENIAL OF HIS RULE 3.851 MOTION AND THE UNDEFINED "CAUSE" STANDARD.

2. First, Mr. Geralds submits that his appeal is not one within this Court's discretionary jurisdiction. *See* Fla. R. App. Pro. 9.030(a)(2). Mr. Geralds is exercising a substantive right

to appeal the denial of his successive Rule 3.851 motion. *See* Fla. Stat. § 924.066 (2016); Fla. R. App. Pro 9.140(b)(1)(D). In his appeal, this Court "**shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal**." Fla. R. App. Pro. 9.140(i)(emphasis added).

3. Because Mr. Geralds has been given the substantive right to appeal the denial of his successive Rule 3.851 motion, that substantive right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)("if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). This principle applies to collateral appeals as well as direct appeals. *Lane v. Brown*, 372 U.S. 477, 484-85 (1963)("the *Griffin* principle also applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the State has already provided one review on the merits.").[1]

4. In addition, linking Mr. Geralds' appeal to the outcome of Mr. Hitchcock's appeal appears to be an effort to bind Mr. Geralds to the outcome of Mr. Hitchcock's appeal. Thus, because Mr. Hitchcock lost his appeal, this Court's order to show cause

[1]In *Lane v. Brown*, the issue arose when the public defender refused to perfect an appeal from a lower court's denial of collateral review because "of the Public Defender's stated belief that an appeal would be unsuccessful." *Id.*, 372 U.S. at 481-82.

makes clear that Mr. Geralds' right to appeal has been severely curtailed. This result implicates Mr. Geralds' right to due process and equal protection, particularly given that the constitutional claims Mr. Geralds raised in his 3.851 motion are different from those set out in Mr. Hitchcock's briefing. A denial of Mr. Hitchcock's appeal should not govern the issues that are present in Mr. Geralds' appeal.

5. Importantly, should Mr. Geralds be permitted to submit briefing he intends to address this Court's decision in *Hitchcock v. State* and explain how this Court's ruling there creates claims under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment, as well as the Eighth Amendment in light of *Furman v. Georgia*, 408 U.S. 238 (1972), and that Mr. Geralds' sentence of death is unconstitutional. Mr. Geralds submits that he must be allowed to file his briefs in accordance with the rules of appellate procedure.

6. Indeed, under the Florida Rules of Appellate Procedure, appellants are normally permitted to file an initial and reply brief in conformity with those rules explaining why the trial court should not be affirmed. It would appear that this Court has *sua sponte* decided that Mr. Geralds is not entitled to the standard appellate process. It is clear that this Court will not even allow Mr. Geralds to file his briefing before deciding whether he has shown "cause" within the meaning of the October 27th order which only affords Mr. Geralds twenty pages to show "cause." However, if he briefed his case, he would be allowed an Initial Brief of 75 pages in length and a Reply Brief of 25 pages

in length. This Court's action is contrary to the Due Process and Equal Protection Clause of the Fourteenth Amendment.

7. This Court's issuance of show cause order has occurred without any notice of the standard by which the "cause" is to be measured. This is in violation of due process. The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)(Powell, J., concurring).

8. Previously, the filing of a notice of appeal was sufficient "cause" for an appeal to proceed under the Florida Rules of Appellate Procedure. But without any notice beyond the directive set forth in the October 27th show cause order and without guidance as to what constitutes "cause" sufficient to allow an appeal to proceed under the Florida Rules of Appellate Procedure, this Court before Mr. Geralds has filed a single sentence relating to his appeal explaining why the circuit court's rulings should not be affirmed, *sua sponte* and on *ad hoc* basis throws the rule book out and gives Mr. Geralds 20 pages and 20 days to demonstrate some undefined "cause."

9. On January 9, 2017, undersigned counsel filed a Rule 3.851 motion on behalf of Mr. Geralds. The motion presented four claims on Mr. Geralds' behalf: 1) Mr. Geralds' sentence of death

violated the Sixth Amendment, pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016); 2) Under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Mr. Geralds' death sentence violates the Eighth Amendment. Mr. Geralds' argument focused extensively on the fact that his jury did not appreciate the significance of its recommendation. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); 3) This Court's application of retroactivity to capital defendants whose death sentences became final after June 24, 2002, violates the Eighth Amendment; and 4) The requirement that a jury unanimously find that a capital defendant was eligible for a sentence of death changes the analysis of claims like Mr. Geralds' newly discovered evidence and ineffective assistance of counsel claims. On May 18, 2017, Mr. Geralds amended his motion to include a fifth claim: 5) The Fourteenth Amendment to the United States Constitution requires the retroactive application of the substantive rule established by Chapter 2017-1, which precludes the imposition of a death sentence unless a jury unanimously returns a death recommendation.

10. Additionally, specific circumstances were raised before the circuit court. An example of a factual issue was the fact this Court struck an aggravating factor considered by the jury and found by the trial judge in sentencing Mr. Geralds to death. Though this Court struck the CCP aggarvator, the Court refused to remand for a second re-sentencing focusing on how the error would have effected the trial court, rather than the jury: "we are persuaded beyond a reasonable doubt that even without the aggravating circumstance of cold, calculated, and premeditated

murder, the trial court still would have found that the aggravating factors present here substantially outweighed the mitigating evidence." *See Geralds v. State*, 674 So. 2d 96 (Fla. 1996). Mr. Geralds' jury clearly considered an invalid aggravator. The issue of the jury considering and the trial judge finding an invalid aggravator in relation to the significance of *Hurst v. Florida* and *Hurst v. State* on this issue was neither raised nor decided in *Hitchcock v. State*.

11. Counsel can and does note that the procedure that this Court has unveiled for use in Mr. Geralds' case was not employed in *Hitchcock v. State*. There was no requirement there that Mr. Hitchcock show "cause" because his appeal would proceed under the Florida Rules of Appellate Procedure. There Mr. Hitchcock was permitted to have counsel brief his issues. And certainly after the decision in *Hitchcock* issued, he had the right to have counsel file a motion for rehearing on which the Florida Rules of Appellate Procedure place no page limits. There is no doubt that undersigned counsel on behalf of Mr. Geralds would have taken advantage of the right to file a motion for rehearing to explain that this Court's ruling created a huge problem with the constitutionality of Florida's capital sentencing scheme under the Eighth and Fourteenth Amendments.

12. Indeed, in *Hitchcock v. State*, _ So. 3d _, 2017 WL 3431500 (Fla. August 10, 2017), this Court wrote:

> We have consistently applied our decision in *Asay*, denying the retroactive application of *Hurst v. Florida* as interpreted in *Hurst v. State* to defendants whose death sentences were final when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556

(2002).

2017 WL 3431500 at *1. This Court then addressed Hitchcock's arguments saying:

> Although Hitchcock references various constitutional provisions as a basis for arguments that *Hurst v. State* should entitle him to a new sentencing proceeding, these are nothing more than arguments that *Hurst v. State* should be applied retroactively to his sentence, which became final prior to *Ring*. As such, these arguments were rejected when we decided *Asay*.

2017 WL 3431500 at *2. That is the extent of this Court's decision in *Hitchcock v. State*. Yet, this Court's premise: that Hitchcock's issues were decided by *Asay* is erroneous. Perhaps most significantly, it is simply impossible that the retroactivity of the constitutional right to a life sentence unless a jury returned a unanimous death recommendation which was recognized in *Hurst v. State* on the basis of the Eighth Amendment and the Florida Constitution could have been decided in *Asay v. State*, 210 So. 3d 1 (Fla. 2016). It simply was not raised there.

13. *Hurst v. Florida* issued on January 12, 2016. In challenging his death sentence in his 3.851 motion filed in late January of 2016, Asay relied upon *Hurst v. Florida*. Asay argued that under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *Hurst v. Florida* should be held to be retroactive. Briefing was completed in *Asay*, Case No. SC16-223, on February 23, 2016. Oral argument was held on March 2, 2016. Other than two pro se pleadings filed in May of 2016, nothing further was filed by Asay.

14. *Hurst v. State* issued on October 14, 2016. Asay filed nothing after the issuance of *Hurst v. State* before this Court's decision in *Asay v. State* issued on December 22, 2016. Asay did

not present any arguments or constitutional claims based on *Hurst v. State*. Asay did not present an argument that his death sentences violated the Eighth Amendment or the Florida Constitution on the basis of the ruling in *Hurst v. State*. Asay made no arguments regarding the retroactivity of *Hurst v. State*.

15. And, for the adversarial process to properly function, a court can only decide an issue after the adversaries have briefed the court on the pros and cons of their respective positions. As explained by the United States Supreme Court:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (opinion for the court by Scalia, J.). In this case, petitioners did not ask us to hold that there is no constitutional right to informational privacy, and respondents and their amici thus understandably refrained from addressing that issue in detail. It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.

Nat'l Aeronautics and Space Admin. v. Nelson, 562 U.S. 134, 147 n.10 (2011).

16. Because, undersigned was not counsel for Mr. Hitchcock, she could not present this argument, or any others, in a motion for rehearing. And, due to the unusual procedure that this Court has directed, Mr. Geralds is precluded from being heard and fully presenting his arguments.

17. Mr. Geralds submits that this procedure along with the unknown standard of what constitutes cause violates due process and equal protection. Mr. Geralds requests that this Court permit him to fully brief his claims under the known standards that

govern an appeal from the denial of a Rule 3.851 motion.

B. MR. GERALDS' SUCCESSIVE RULE 3.851 MOTION

18. As to the claims in Mr. Gerald's Rule 3.851 motion, Mr. Geralds raised at least two claims that do not appear to have been raised in Mr. Hitchcock's 3.851 motion because there is nothing in the initial brief addressing them and this Court's opinion does not address them. As to the other claims, although there is some overlap with Mr. Hitchcock's arguments, each one of Mr. Geralds' claims can only be resolved by an analysis of matters specific to his case.[2]

19. As to Claim I in his Rule 3.851 motion, Mr. Geralds argued a Sixth Amendment claim based upon *Hurst v. Florida*, Mr. Geralds seeks to argue in his appeal that this Court's rulings in *Asay* and *Mosley* abandoning the binary nature of the balancing test set forth in *Witt v. State* means that each defendant with a pre-*Ring* death sentences is entitled to receive what Mr. Asay received, a case specific balancing of the *Witt* factors.[3] In his

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[2]For example, the question of whether "fundamental fairness" or "manifest injustice" warrant a particular result in a capital defendant's case requires a case by case analysis. The concept of fundamental fairness as discussed and embraced in *Mosley v. State* and the manifest injustice exception to the law of the case doctrine employed in *Thompson v. State* are no different. Both require a case by case determination of their applicability. Mr. Geralds argued the appropriateness of vacating his death sentence based upon fundamental fairness in his motion for rehearing.

[3]In *Asay v. State*, this Court conducted an analysis of *Hurst v. Florida* pursuant to *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and concluded that Mr. Asay should not receive the retroactive benefit of the Sixth Amendment ruling in *Hurst v. Florida* because his conviction and death sentence were final in 1991. This Court observed that *Hurst v. Florida* found merit in a claim that Mr. Hurst had raised based upon the Sixth Amendment ruling in *Ring v.*

briefing, Mr. Hitchcock does not argue that in light of *Asay* and *Mosley*, the *Witt* balancing test for determining whether *Hurst v. Florida* applies retroactively must be conducted case by case. And, this Court did not address those issues in its opinion

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Arizona, 536 U.S. 584 (2002). Without hearing what additional arguments a litigant with a death sentence that became final after Mr. Asay's 1991 finality date and before the issuance of *Ring* on June 24, 2002, might have under *Witt*, this Court in *Asay* referenced June 24, 2002, as a potential dividing line. The decision in *Mosley v. State*, which issued the same day *Asay* did, concluded that the Sixth Amendment decision in *Hurst v. Florida* should apply to post-*Ring* death sentences.

Within the *Asay* decision, there is no indication that a retroactivity analysis under *Witt* was conducted as to this Court's decision in *Hurst v. State*, which was a ruling based upon the Florida Constitution and the Eighth Amendment. *Hurst v. State* specifically acknowledged the unanimity requirement it set forth was not based upon the Sixth Amendment and thus was not required by *Ring*. However, in *Mosley v. State*, this Court addressed the retroactivity of *Hurst v. State* under *Witt* and concluded that post-*Ring* death sentences were entitled to the retroactive benefit of its unanimity requirement. In subsequent rulings, there have been representations that *Asay* determined that *Hurst v. State* did not apply retroactively under *Witt* to cases final before *Ring* issued. *See Archer v. Jones*, 2017 WL 1034409 (Fla. March 17, 2017); *Zack v. State*, _ So. 3d _, 2017 WL 2590703 *5 (Fla. June 15, 2017)(Pariente, J., concurring in result).

While both Mr. Hitchcock and Mr. Geralds have raised issues as to the *Witt* analysis that was conducted in *Asay v. State* regarding *Hurst v. Florida*, the argument made in the *Hitchcock v. State* briefing quickly diverges from the claims that Mr. Geralds asserted in his Rule 3.851 motion. The *Hitchcock* brief does not seem to view *Hurst v. Florida* and *Hurst v. State* as involving distinctly different constitutional claims. A Sixth Amendment claim is distinctly different from an Eighth Amendment claim or a claim based upon a right set forth in the Florida Constitution that is not in the Sixth Amendment.

Quite simply, the *Hitchcock* briefing does not address the arguments that Mr. Geralds is entitled to raise in this, his appeal of right from the denial of a successive Rule 3.851 motion, as to his distinctly different rights under *Hurst v. Florida* and *Hurst v. State*. And, this issue was not decided in *Hitchcock v. State*.

denying Mr. Hitchcock relief.

20. As to Claim II, under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), a unanimous jury verdict in favor of a death sentence violates the Eighth Amendment if the jury was not correctly instructed as to its sentencing responsibility. *Caldwell* held: "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence.

21. In *Caldwell*, the prosecutor responding to defense counsel's argument stated in his argument before the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id*. at 325. Because the jury's sense of responsibility was improperly diminished by this argument, the United States Supreme Court held that **the jury's unanimous verdict** imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). *Caldwell* explained: "Even when a sentencing jury is unconvinced that death

is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Id*. at 331.[4]

22. Jurors must feel the weight of their sentencing responsibility and know about their individual authority to preclude a death sentence. *See Blackwell v. State*, 79So. 731, 736 (Fla. 1918)(prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is not explained or is diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

23. The United States Supreme Court in *Caldwell* found that

[4]This would certainly apply to the circumstances in Mr. Geralds' case when the jury was repeatedly reminded its penalty phase verdict was merely an advisory recommendation.

diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

24. If a bias in favor a death recommendation increases when the jury's sense of responsibility is diminished, removing the basis for that bias increases the likelihood that one or more jurors will vote for a life sentence. The likelihood increases even more when the jury receives accurate instruction as to each juror's power and authority to dispense mercy and preclude a death sentence. In this regard, the context of the prosecutor's improper argument in *Caldwell* is important. The prosecutor was responding to and trying to blunt defense counsel's assertion that the sentencing decision rested with the jury and that it could chose mercy. *Caldwell*, 472 U.S. at 324.

25. Mr. Geralds' jury was not advised of each jurors' authority to dispense mercy. Indeed, the instructions suggested otherwise.

26. The circumstances under which Mr. Geralds' resentencing jury returned its 12-0 death recommendation shows that it cannot now be viewed as a valid unanimous verdict or that the *Hurst* error was harmless without violating the Eighth Amendment.[5] "Even

[5]Further, Mr. Geralds submits that his original 8-4 recommendation is *res judicata* in relation to any harmless error

when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" *Caldwell*, 472 U.S. at 331. The advisory recommendation simply "does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 341.

27. If permitted to brief his claims, Mr. Geralds intends to argue that this Court cannot rely on the jury's death recommendation in his case as showing either that he was not deprived of his Eighth Amendment right to require a unanimous jury's death recommendations or that the violation of the right was harmless. To do so would violate the Eighth Amendment because the advisory verdict was not returned in proceedings compliant with the Eighth Amendment. *Caldwell*, 472 U.S. at 332 ("The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.").

28. In fact, in *Hurst v. Florida*, the United States Supreme Court warned against using what was an advisory verdict to conclude that the findings necessary to authorize the imposition a death sentence had been made by the jury:

> "[T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory

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analysis because it demonstrates the unreliability of his death sentence.

> recommendation by the jury as the necessary factual finding that *Ring* requires.

Hurst v. Florida, 136 S. Ct. at 622. An advisory verdict (premised upon inaccurate information regarding the binding nature of a life recommendation and the juror's inability to be merciful based upon sympathy) cannot be used as a substitute for a unanimous verdict from a properly instructed jury. *California v. Ramos*, 463 U.S. 992, 1004 (1983)("Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed.").

29. Mr. Geralds' *Caldwell* issue and the issue of the jury considering and the trial court finding an invalid aggravating circumstance are factual in nature and thus, the facts specific to the unreliability of Mr. Geralds' penalty proceedings was neither raised nor addressed in *Hitchcock v. State*.

30. Claim III of Mr. Geralds' 3.851 motion, challenges the seemingly bright line, as in time line, that resulted from *Mosley* and *Asay*. Here, Mr. Geralds contends that this bright line set at June 24, 2002, is so arbitrary as to violate the Eighth Amendment principles enunciated in *Furman v. Georgia*. In separating those who are to receive the retroactive benefit of *Hurst v. Florida* and/or *Hurst v. State* from those who will not, the line drawn operates much the same as the IQ score of 70 cutoff at issue in *Hall v. Florida*.

31. Claim III is premised upon the Eighth Amendment and its requirement that a death sentence carry extra reliability in order to insure that it was not imposed arbitrarily. Heightened reliability in capital cases is a core value of the Eighth Amendment and *Furman v. Georgia*. In *Hurst v. State*, this Court held that enhanced reliability warranted the requirement that a death recommendation be returned by a unanimous jury. In doing so, the Court effectively recognized that a death sentence without the unanimous consent of the jury was lacking in reliability and thus did not carry the heightened reliability required by the Eighth Amendment. In that context, Mr. Geralds will argue in his appeal of the denial of Claim III of his 3.851 motion that if this Court's decisions in *Mosley* and *Asay* established a bright line cutoff as to the date at which the State's interest in finality trumped the interests of fairness and curing individual injustice, such a bright line cutoff violated the Eighth Amendment principle set forth in *Hall v. Florida*. Mr. Hitchcock did not make this argument as to the retroactive benefit of *Hurst v. State* being arbitrarily limited by a bright line cutoff in violation of the Eighth Amendment. And, certainly, this Court did not address this issue in its opinion denying Mr. Hitchcock relief.

32. While this Court in *Hurst v. State* found non-unanimous death recommendations were lacking in reliability, the level of unreliability is obviously compounded in some cases by matters and issues that increase the unreliability of a particular death sentence. Just as there were death sentenced individuals on the

wrong side of the 70 IQ score cutoff who were likely intellectually disabled and erroneously under sentence of death, there are individuals with pre-Ring death sentences that rest on proceedings layered in error and/or outdated science and/or discredited forensic evidence such that the cumulative unreliability rises up to trump the State's interest in finality.

33. Indeed, the specific issues of Mr. Geralds' jury being improperly instructed as to its role and considering an invalid aggravating factor was neither raised nor addressed in *Hitchcock v. State*. Yet, it is undeniable that these issues are at the core of the recommendation for death.

34. As to Claim IV of Mr. Geralds' Rule 3.851 motion, it did not involve the retroactivity of *Hurst v. Florida* and *Hurst v. State*. Instead, the claim arose from the fact that at a resentencing if one is ordered, Mr. Geralds will have a right to a life sentence unless the jury returns a unanimous death recommendation. The claim asks how this affects the validity of this Court's rejection of Mr. Geralds' newly discovered evidence, and *Strickland* claims in his previous successive motion to vacate. Mr. Geralds' challenge is to this Court's affirmance of the denial of his prior Rule 3.851 motions.

35. This Court's recent decision in *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017), supports the validity of Claim IV of Mr. Geralds' Rule 3.851 motion.

36. In his initial briefing, Mr. Hitchcock does not include the same claim that Mr. Geralds presented. And, this Court did not address that issues in its opinion denying Mr. Hitchcock

relief.

37. In Argument VII of his briefing, Mr. Hitchcock argues that all prior postconviction rulings must be revisited in light of *Hurst v. Florida*. Beyond specifying a prior denial of a claims based on *Ring v. Arizona* and on *Caldwell v. Mississippi*, Mr. Hitchcock just seeks to incorporate his prior 3.851 motions. *See* (*Hitchcock v. State*, Case No. SC17-445, Initial Brief at 57). This Court has previously held referring to and incorporating by reference arguments presented in a 3.851 motion constitutes an inadequate way to present issues. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Whatever it is that Mr. Hitchcock has raised, it is not the same as Claim IV of Mr. Geralds' Rule 3.851 motion, nor the way Mr. Geralds will brief his claims before this Court.

38. Mr. Geralds presented ineffective assistance of counsel, *Brady* and newly discovered evidence claims in his prior collateral proceeding. This Court's jurisprudence indicates these claims must be evaluated cumulatively. This Court has also held that a resentencing is required on a newly discovered evidence claim if it is probable that at a resentencing the defendant will get a less severe sentence. This analysis is forward looking. And looking forward, Mr. Geralds will be entitled at a resentencing to a less severe sentence unless the jury unanimously returns a death recommendation. Undoubtedly, in light of the new evidence and all the evidence developed in collateral proceeding that will

be admissible, Mr. Geralds will receive a sentence of less than death.

39. The specific claim raised by Mr. Geralds was simply not raised by Mr. Hitchcock or addressed by this Court. Claim IV is a case specific claim requiring a case by case analysis.

40. In Claim V, Mr. Geralds challenged his sentence of death in the basis of Chapter 2017-1. Mr. Hitchcock raised no issue related to Chapter 2017-1. Chapter 2017-1 amended §921.141(2)(c) to provide: "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole." Section 921.141(3)(a) provides that "[i]f the jury has recommended a sentence of ...[l]ife without the possibility of parole, the court shall impose the recommended sentence." As a result, Florida's capital sentencing statute now precludes the imposition of a death sentence unless a properly instructed jury returns a unanimous death recommendation.

41. Chapter 2017-1 was crafted by the Florida Legislature and signed into law by the Governor. This Court has said: "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). It also has written: "Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969).

42. Chapter 2017-1 includes the right to a life sentence unless a jury returns a unanimous death recommendation which it extended retrospectively to all capital defendants in pending capital prosecutions regardless of the date of the alleged capital crime.

43. A capital defendant's right to a life sentence unless a jury returns a death recommendation is a substantive right. Whether viewed as a legislatively created right that applies retrospectively or a constitutional right identified in *Hurst v. State*, it is a substantive right, not a procedural rule. The right to a life sentence unless a properly instructed jury unanimously returns a death recommendation as noted in *Hurst v. State* did not arise from the Sixth Amendment principles of *Apprendi v. New Jersey*, *Ring v. Arizona*, or *Hurst v. Florida*. It is derived either from legislative enactments or the Florida Constitution or both. A state created right that carries a liberty or life interest with it is protected by the Due Process Clause of the Fourteenth Amendment.

44. Mr. Geralds' argument is not about retroactivity of a court ruling. It is about a statutorily created substantive right that was intended to be retrospective. Mr. Hitchcock did not raise this issue in his briefing before this Court and this Court's opinion in *Hitchcock v. State* does not address it.

WHEREFORE, Mr. Geralds requests that this Court permit him to submit briefing on the issues that he raised in his Rule 3.851 motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing response has been furnished by electronic service to Lisa Hopkins, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 16th day of November, 2017.

/s/. Linda McDermott
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